

Short Legislative History of the Virginia Residential Property Disclosure Act

The Virginia Residential Property Disclosure Act (“VRPDA”) was first enacted by the 1992 General Assembly. Under the first version of the VRPDA, there were two options: (i) a seller disclosure statement with considerable details and (ii) a “disclaimer statement” whereby the seller sells the house, as is, with no disclosures. See Attachment A.

Sellers are consumers too and do not know what to disclose, without hiring a third-party professional (more than what has become a licensed home inspector) to conduct detailed inspections of their house. As such, consistent with Virginia being a buyer-beware state, almost 100% of sellers exercised their right under the 1992 legislation to give a potential homebuyer a disclaimer statement. A major disadvantage of a disclaimer statement is that a seller could conceal latent defects (not visible to the naked eye) and not be in violation of Virginia law.

In the 1996 General Assembly, the VRPDA was amended to create a buyer-beware disclosure with the seller making no representation, regardless of giving a disclaimer statement, of what is off-parcel, stating that the buyer should exercise due diligence to determine what may exist off-parcel the parcel being purchased by the buyer. However, the disclosure disclaimer statement approach was still maintained. See Attachment B.

There were various minor amendments made to the VRPDA from 1996 to 2007 but the same fundamental legal structure was left intact. In 2006, the Virginia Housing Commission, which at the time was Chaired by Delegate Terrie Suit, began to evaluate whether a different legal structure should be proposed for the VRPDA.

In the 2007 General Assembly, Delegate Suit carried HB 2011. The VRPDA was fundamentally amended to delete the disclosure and disclaimer statements and move completely to what was termed a “red flag disclosure” from the seller to the buyer. The public policy objective was to build upon the buyer beware approach first adopted in the 1996 legislation with the seller giving the buyer a list of specific items to consider in their buying decision, and exercise whatever due diligence that buyer feels appropriate to determine whether any of the items on the list would change their buying decision. Also, by moving to a buyer beware approach, the Virginia case law that gave a buyer a cause of action against a seller who intentionally withheld information about a latent defect was restored. See Attachment C.

Along the way between 1996 and 2007, there were a few “mandatory disclosures” passed by the General Assembly. The mandatory disclosures included: (i) where the seller had received written notice from a locality that the house had a current pending building code violation that seller had not remedied; (ii) where the seller had actual knowledge that defective drywall was used in the house; (iii) where the seller had actual knowledge that the house had been used as a meth lab; (iv) where the seller had actual knowledge that the parcel of property upon which the house is located has a private stormwater management facility (not known to the locality); and (v) where the US Navy was threatening to move out of Oceana Air Station unless there was

a mandatory disclosure of US Navy noise zones as shown on official zoning maps of the City of Virginia Beach and Chesapeake.

Since January 1, 2008, the VRPDA has become a Christmas tree of buyer beware items, with the General Assembly steadily adding additional items to the buyer beware disclosures like (i) stormwater management, (ii) waste systems, (iii) solar equipment on the property, (iv) flood hazard areas, and so on. The list of buyer beware items has grown to the point that the question comes up as to whether the buyer beware disclosure form has become another large document in real estate transactions that buyers don't take time to read. The policy objective of the buyer beware form is consumer protection and to alert the buyer to items that may affect their decision to buy the property.

In the 2017 General Assembly, legislation was passed to reposition the "red flag disclosure" into a "buyer beware disclosure". As of the 2017 General Assembly, there were 12 separate items included in the buyer beware disclosure. See Attachment D.

As an example, the 2020 General Assembly amended the VRPDA to add "marine clay" to the buyer beware disclosure statewide when marine clay apparently only is present in 2 Northern Virginia localities. A lot of folks in other areas of the state often ask what is marine clay and how do they determine whether they have marine clay, and how does it impact them in the first place?

The 2021 General Assembly added some additional items to the buyer beware disclosure form which prompted a request from Delegate Simon to have the Virginia Housing Commission to discuss the VRPDA and make recommendations to the General Assembly. Since I had a hand on behalf of the Virginia Realtors in writing the 1992 legislation and each year through the 2021 Session, I was requested to provide a short summary of the VRPDA.

There does appear to be an easy answer on what recommendations if any the Virginia Housing Commission should make to the 2022 General Assembly. The Virginia Realtors believe the buyer beware approach is the best approach, as opposed to a mandatory disclosure by sellers. Sellers are consumers just like buyers. Perhaps you could recommend a summary of buyer beware disclosures in "plain English" but then what happens to the items not listed in the summary?

I am happy to answer any questions and look forward to the discussion.

Chip Dicks
Gentry Locke
Legislative Counsel
Virginia Realtors
chipdicks@gentrylocke.com
804-225-5507